



December 6, 2001

Ms. Leah Curtis Morris
Curtis, Alexander, McCampbell & Morris
P.O. Box 1256
Greenville, Texas 75403-1256

OR2001-5692

Dear Ms. Morris:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 155747.

The Hunt Memorial Hospital District (the "district"), which you represent, received a request for a former employee's complete personnel file "and/or any and all other communications or records involving the employment, and/or retention, and/or discharge" of the employee. You claim that the requested information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.107, and 552.111 of the Government Code. We have considered the exceptions you raise and have reviewed the information you submitted.

We first note that some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides that

the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). The district must release the completed personnel evaluations in Exhibit B under section 552.022(a)(1), unless these records are excepted from disclosure under section 552.108 or expressly confidential under other law. Section 552.103 is a discretionary exception to disclosure that protects the governmental body's interests and may be waived. As such, this exception is not other law that makes information confidential for the purposes of section 552.022. Therefore, the completed personnel evaluations may not be withheld under section 552.103, and thus we do not address this exception with respect

to those documents. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision No. 542 at 4 (1990) (litigation exception does not implicate third-party rights and may be waived).

Next, we address your claim under section 552.103 with respect to the remaining information. This exception provides in part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The governmental body must provide relevant facts and documents sufficient to establish the applicability of section 552.103 to the information at issue. To meet this burden, the governmental body must demonstrate: (1) that litigation was pending or reasonably anticipated on the date of its receipt of the request for the information and (2) that the requested information is related to the litigation. *See University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App. — Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App. — Houston [1st Dist.] 1984, writ ref'd n.r.e.); *see also* Open Records Decision No. 551 at 4 (1990). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *Id.*

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To establish that litigation is reasonably anticipated, a governmental body must provide this office with "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." *Id.* Among other examples, this office has concluded that litigation was reasonably anticipated where the opposing party took the following objective steps toward litigation: (1) filed a complaint with the Equal Employment Opportunity Commission ("EEOC"), *see* Open Records Decision No. 336 (1982); (2) hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and (3) threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

You claim that all of the requested information relates to anticipated litigation. You state that the former employee to whom the information pertains retained the requestor, an attorney, in an attempt to negotiate a better severance package. You inform us that the requestor previously was a member of the district's medical staff. You assert that the district reasonably anticipates litigation, "[g]iven the history of [the requestor] with the District[.]" Having considered your representations, we find that you have not demonstrated that the district reasonably anticipated litigation on the date of its receipt of this request for information. *See also* Open Records Decision Nos. 518 at 5 (1989) (governmental body must furnish evidence that litigation involving a specific matter is realistically contemplated and more than mere conjecture), 361 at 2 (1983) (fact that an individual has hired an attorney or that a request for information was made by an attorney does not, without more, demonstrate that litigation is reasonably anticipated). Therefore, none of the submitted information is excepted from disclosure under section 552.103.

You also raise section 552.107 of the Government Code with regard to the information submitted as Exhibit C. Section 552.107(1) protects information that comes within the attorney-client privilege. In Open Records Decision No. 574 (1990), this office concluded that section 552.107(1) excepts from disclosure only what rule 1.05 of the Texas Disciplinary Rules of Professional Conduct defines as "privileged information," that is, either client confidences or the attorney's legal advice or opinions. *See* ORD 574 at 5. Section 552.107(1) does not apply to all client information held by a governmental body's attorney. *Id.* Section 552.107(1) does not protect purely factual information. *Id.* Thus, this exception does not except from disclosure the factual recounting of events or the documentation of calls made, meetings attended, and memos sent. *Id.*

You assert that Exhibit C contains privileged attorney-client communications. Based on this representation and our review of the information at issue, we conclude that the district may withhold Exhibit C in its entirety under section 552.107(1).

Next, we address your claim under section 552.111 of the Government Code with respect to Exhibit D. Section 552.111 excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." The purpose of this exception is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App. --San Antonio 1982, no writ); Open Records Decision No. 538 at 1-2 (1990). In Open Records Decision No. 615 (1993), this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ). We determined that section 552.111 excepts only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See* ORD 615 at 5. A governmental body's policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; *see also City of*

Garland v. The Dallas Morning News, 22 S.W.3d 351 (Tex. 2000) (holding that personnel-related communications not involving policymaking were not excepted from public disclosure under section 552.111). A governmental body's policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body's policy mission. See Open Records Decision No. 631 at 3 (1995).

You state that Exhibit D consists of information relating to the former employee's performance that is maintained by her supervisors. This information pertains to a personnel matter. You have not demonstrated that this information consists of advice, recommendations, and opinions that reflect the district's policymaking processes. Therefore, none of the information in Exhibit D is excepted from disclosure under section 552.111.

You also raise sections 552.101 and 552.102 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This exception encompasses the common law right of privacy. Information must be withheld from the public under section 552.101 in conjunction with common law privacy when the information is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) of no legitimate public interest. See *Industrial Found. v. Texas Ind. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), cert. denied, 430 U.S. 931 (1977). Common law privacy protects the specific types of information that the Texas Supreme Court held to be intimate or embarrassing in *Industrial Foundation*. See 540 S.W.2d at 683 (information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs). This office has since concluded that other types of information are private under section 552.101. See Open Records Decision No. 659 at 4-5 (1999).

Certain kinds of personal financial information also are private under section 552.101. In prior decisions, this office has determined that although financial information relating only to an individual ordinarily satisfies the first element of the common law privacy test, the public has a legitimate interest in the essential facts about a financial transaction between an individual and a governmental body. See, e.g., Open Records Decision Nos. 600 at 9-12 (1992) (TexFlex benefits), 545 at 3-5 (1990) (deferred compensation plan), 523 at 3-4 (1989) (certain financial information contained in loan files of veterans participating in Veterans Land Board programs), 373 at 3-4 (1983) (certain financial information contained in housing rehabilitation grant application files).

Section 552.102(a) of the Government Code protects "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]" The test of privacy under section 552.102 is the same as the test under section 552.101 in conjunction with *Industrial Foundation*. However, because of the greater legitimate public interest in matters involving employees of governmental bodies, privacy under section 552.102 is confined to information that reveals "intimate details of a highly personal nature."

See Hubert v. Harte-Hanks Tex. Newspapers, Inc., 652 S.W.2d 546, 549-51 (Tex. App.--Austin 1983, writ ref'd n.r.e.); Open Records Decision Nos. 473 at 3 (1987), 444 at 3-4 (1986), 423 at 2 (1984). Thus, public employee privacy under section 552.102 is "very narrow." *See* Open Records Decision No. 400 at 5 (1983).

You assert that Exhibits B and D contain information that may be highly embarrassing and of a private nature. We conclude that most of this information is a matter of legitimate public interest. *See* Open Records Decision Nos. 444 at 5 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, or promotion of public employee), 423 at 2 (1984) (information may not be withheld under section 552.102 if it is of sufficient legitimate public interest, even if person of ordinary sensibilities would object to release on grounds that information is highly intimate or embarrassing). Exhibit B contains a small amount of information relating to the former employee that is private under sections 552.101 and 552.102. We note, however, that the requestor is an attorney for the former employee. As the former employee's attorney, the requestor has a special right of access to private information that relates only to his client. *See* Gov't Code § 552.023.¹ Therefore, the private information that relates to the former employee may not be withheld from the requestor under sections 552.101 or 552.102.

Section 552.101 also protects information that other statutes make confidential. A W-4 form is confidential under section 6103 of title 26 of the United States Code. Section 6103(a) makes federal tax return information confidential. Therefore, the district must withhold the W-4 forms in Exhibit B under section 6103(a) of title 26 of the United States Code.

Exhibit B also includes the former employee's bank account numbers. The Seventy-seventh Legislature added section 552.136 to chapter 552 of the Government Code.² This newly enacted exception to public disclosure makes certain account number information confidential. Senate Bill 694 was passed on May 14, 2001, became effective when it was signed by the Governor on May 26, 2001, and provides in relevant part:

¹Section 552.023(a) provides that "[a] person or a person's authorized representative has a special right of access, beyond the right of the general public, to information held by a governmental body that relates to the person and that is protected from public disclosure by laws intended to protect that person's privacy interests." *See also* Open Records Decision No. 481 at 4 (1987) (stating that privacy theories are not implicated when an individual asks a governmental body to provide him with information concerning himself).

²The Legislature also enacted two other bills that add a section 552.136 to chapter 552. House Bill 2589 makes certain e-mail addresses confidential. *See* Act of May 22, 2001, 77th Leg., R.S., ch. 545, § 5, 2001 Tex. Sess. Law Serv. 974, 975 (Vernon) (to be codified as Gov't Code § 552.136). Senate Bill 15 makes information maintained by family violence shelter centers confidential. *See* Act of May 3, 2001, 77th Leg., R.S., ch. 143, § 1, 2001 Tex. Sess. Law Serv. 279 (Vernon) (to be codified as Gov't Code § 552.136). Senate Bill 694 also enacted the same language as House Bill 2589 regarding the confidentiality of e-mail addresses, but codified it as section 552.137 of the Government Code. *See* Act of May 14, 2001, 77th Leg., R.S., ch. 356, § 1, 2001 Tex. Sess. Law Serv. 614 (Vernon) (to be codified as Gov't Code § 552.137).

Sec. 552.136. CONFIDENTIALITY OF CREDIT CARD, DEBIT CARD, CHARGE CARD, AND ACCESS DEVICE NUMBERS.

(a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

- (1) obtain money, goods, services, or another thing of value; or
- (2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.

Act of May 14, 2001, 77th Leg., R.S., ch. 356, § 1, 2001 Tex. Sess. Law Serv. 614 (Vernon) (to be codified as Gov't Code § 552.136). Bank account numbers must be withheld from the public under section 552.136 of the Government Code. The requestor also has a special right of access to this information, however, under section 552.023.

We also note that Exhibits B and D contain the former employee's social security number and other personal information. The home address, home telephone number, and social security number of a current or former employee of a governmental body, as well as information that reveals whether the individual has family members, are excepted from public disclosure under section 552.117(1) of the Government Code, if the current or former employee timely requested that this information be kept confidential under section 552.024. *See* Open Records Decision Nos. 622 (1994), 455 (1987). However, the requestor also has a special right of access to the former employee's section 552.117 information under section 552.023.

Lastly, we note that Exhibit D contains medical records. The disclosure of medical records is governed by the Medical Practice Act (the "MPA"), as codified at subtitle B of title 3 of the Occupations Code. *See* Occ. Code § 151.001. Section 159.002 of the MPA provides in part:

- (a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter . . . may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Id. § 159.002(a)-(c). The MPA also includes provisions that govern the disclosure of information that it encompasses. *See id.* §§ 159.003, .004, .005, .006. This office has determined that in governing access to a specific subset of information, the MPA prevails over the more general provisions of chapter 552 of the Government Code. *See* Open Records Decision No. 598 (1991). We have marked the information that is governed by the MPA. The district may release this information only if the MPA permits the district to do so.

In summary, none of the requested information is excepted from disclosure under sections 552.102, 552.103, or 552.111. The district may withhold Exhibit C under section 552.107(1) of the Government Code. The district must withhold the W-4 forms in Exhibit B under section 552.101 in conjunction with section 6103 of title 26 of the United States Code. The district may release the medical records in Exhibit D only if the MPA permits the district to do so. The district must release the rest of the submitted information to the requestor.³

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling,

³Should the district receive another request for this same information from a person who would not have a special right of access under section 552.023, the district should resubmit this same information and request another ruling.

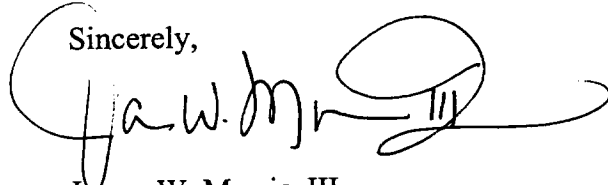
the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "J.W. Morris III", with a large, stylized flourish extending from the end.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 155747

Enc: Marked documents

c: Mr. James M. Rauer
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(w/o enclosures)